

SERVED: October 4, 1994

NTSB Order No. EA-4255

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of September, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-13039
v.)	
)	
HAROLD L. DAVIS,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of an evidentiary hearing held on October 8, 1993.¹ In that decision, the law judge upheld the allegations in an amended order suspending respondent's commercial pilot certificate based on his improper operation of two flights for

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

compensation or hire in violation of the requirements of 14 C.F.R. Part 135, specifically sections 135.5, 135.293(a), 135.293(b), and 135.343.² The law judge modified the period of suspension from 90 days, as sought by the Administrator, to 45 days.³ For the reasons discussed below, respondent's appeal is denied and the initial decision is affirmed.

It is undisputed that respondent was paid to pilot the flights at issue,⁴ which involved transporting corporate executives of Chem-Nuclear Systems, Inc. However, respondent denies that he had operational control over those flights or that they were subject to the requirements of Part 135. He argues that he provided only piloting services, and that because Chem-Nuclear rented the aircraft used on these flights from a separate source (Mathis Aviation) through a separate transaction, Chem-Nuclear had operational control over the flights. Accordingly, respondent reasons, the flights were governed only by Part 91 (setting forth general operating and flight rules), not by Part 135 (governing commercial operations).

The record in this case does not support respondent's position. We agree with the law judge that respondent "had the

² These regulations are set forth in the appendix.

³ The Administrator has not appealed from the reduction in sanction.

⁴ One "flight" consisted of three legs (Columbia, South Carolina, to Harrisburg, Pennsylvania, to Springfield, Illinois, returning to Columbia) and took place over a three-day period from September 2-4, 1992; the other flight was on August 27, 1992, from Columbia, South Carolina, to Raleigh, North Carolina.

full control of this operation." (Tr. 173.) Key to the law judge's analysis, and to ours, is a letter sent by respondent to Mike Cole, the president of Chem-Nuclear, offering the use of an aircraft which Chem-Nuclear had previously chartered from a Part 135 operator (Eagle Aviation) when respondent was employed by that operator, and setting forth total transportation costs for selected destinations. Specifically, respondent wrote:

I have the Cessna 421 that you used when I was with Eagle Aviation. I am offering it on a rental basis to a few of my old customers at a greatly reduced rate. The way this works is you rent the plane from Mathis Aviation and pay the pilot separately.

I have worked up the cost for the three destinations I was told you travel to. They are as follows:

Harrisburg, Pa.	\$2367.00
Springfield, Ill.	\$3100.00
Martinsville, Ill.	\$2891.00

Mike, I hope we can accommodate some of your travel needs. If you have any questions, you can contact me at the above address or call me at [phone number omitted].

(Exhibit A-3.)

The aircraft in question was owned at the time of these flights by Mathis Aviation, a company controlled solely by James Mathis. Mr. Mathis testified that he has used respondent's piloting services on occasion, and that respondent has assisted him in finding clients interested in renting his aircraft. Respondent maintains, however, that he is not connected in any way to Mathis Aviation, and that he has received no compensation from that company other than for pilot services. Mr. Mathis and respondent stated that Chem-Nuclear leased the aircraft from Mathis Aviation and thereby obtained operational control of the

aircraft. Both asserted that neither Mathis Aviation nor respondent had any control over Chem-Nuclear's choice of pilots for the flights. Although Mr. Mathis claimed that there was a written lease agreement between his company and Chem-Nuclear, no such document was produced.⁵

Although respondent maintains that Chem-Nuclear was free to use any qualifying pilot on these flights, both Mr. Cole and his secretary, Ms. Regie Oram (who also dealt with respondent in the course of handling Mr. Cole's travel plans), indicated that Mr. Cole had developed confidence in respondent as a result of charter flights he piloted for Chem-Nuclear while employed by Eagle Aviation, and he never had any intention of considering other pilots.⁶ Indeed, it seems to us that respondent's letter to Mr. Cole implicitly recognizes, and seeks to capitalize on,

⁵ Although we agree with respondent that the lack of a written lease is not dispositive on the issue of whether a rental arrangement existed, it is one factor to consider. We note that once the Administrator had produced some evidence indicating that the flights were controlled by respondent and were thus governed by Part 135 -- which he did, in the form of respondent's letter to Mr. Cole -- the burden shifted to respondent to rebut that evidence. Administrator v. Brown, NTSB Order No. EA-3698 (1992).

We do not share the law judge's apparent belief that these flights would have been properly conducted under Part 91 if only there had been a separate written aircraft lease agreement between Chem-Nuclear and Mathis Aviation. (Tr. 176.) Indeed, even a written lease agreement which explicitly purports to fix operational control with the lessee of an aircraft may not be dispositive on the issue of operational control. See FAA v. Landy, 705 F.2d 624 (2nd Cir. 1982).

⁶ Chem-Nuclear apparently always used two pilots on its charter flights. Although not clearly developed in the record, it appears that respondent procured the second pilot for the flights here at issue. (See Exhibit A-6, containing invoice sent by respondent for "2 pilots".)

the company's prior relationship with him. Thus, it does not support respondent's contention that Chem-Nuclear understood it could have hired any pilot to fly these flights.

Respondent's contention that these flights were properly conducted under Part 91 rests almost entirely on the premise that Chem-Nuclear entered into two separate transactions, one with Mathis Aviation (for aircraft rental) and one with respondent (for pilot services). However, Chem-Nuclear dealt only with respondent, and though separate invoices were sent for aircraft rental from Mathis Aviation and for pilot services from respondent, both invoices were prepared by respondent and both indicated that payment for both should be sent to respondent's home address. Though respondent testified that this was simply to insure that the billed amount was paid correctly, and that he forwarded the check for aircraft rental to Mathis, we think this circumstance further supports the law judge's conclusion that this was "a single deal" controlled by respondent. (Tr. 173.) Indeed, despite the attempt to separate aircraft rental and pilot services into separate transactions, the record as a whole indicates that the two were offered together by respondent, and that they were treated by Chem-Nuclear as a unified transportation package. Our case law makes clear that obtaining both a flight crew and an airplane from the same source (known as a "wet lease") is usually considered conclusive evidence of carriage for compensation or hire. Administrator v. Poirier, 5 NTSB 1928 (1987).

Chem-Nuclear's interest in respondent's offer was based primarily on a desire to save money on air travel. However, Ms. Oram and Mr. Cole indicated that they also wanted to insure that the corporate executives were "handled as professionally . . . and safely as possible" (Tr. 78-79), and that respondent was properly qualified to offer the arrangement outlined in his letter (Tr. 101). Internally-prepared "airplane charter cost justification" worksheets compared the cost of respondent's offer with the costs they would otherwise have incurred using a commercial air carrier. Indeed, despite their apparent recognition that the arrangement offered by respondent was somehow "different" from what they had previously obtained from Eagle Aviation (a carrier subject to the comprehensive certification, training, and testing requirements of Part 135), neither Mr. Cole nor Ms. Oram indicated that they understood the implications -- beyond a difference in price -- of conducting a flight under Part 91 as distinguished from Part 135.

We agree with the Administrator that this case is similar to Administrator v. Golden Eagle Aviation, 1 NTSB 1028 (1971), where we held that, despite the existence of separate contracts with separate entities for lease of aircraft and for piloting/flight services, the respondent in that case was the operator of the flights in that he had offered, and ultimately provided, an entire air transportation service including aircraft and pilots.

In that case, as in this one, "the proposal presented by respondent to [the potential customer] involved a complete air

transportation charter service, including the procurement of a suitable aircraft . . . [and] payment for the entire service was made to respondent, who in turn paid [the aircraft lessor,] "with whom the customer had no direct contact. Id. at 1031. Also, as in Golden Eagle, respondent in this case "exercised complete control over all phases of these operations which required any aviation expertise, leaving to [the customers] only those decisions normally made by any shipper or customer concerning what or who is to be transported, to and from which points, and at what times." Id.

In sum, we think the record belies respondent's implied insistence that Chem-Nuclear knew it was assuming operational control over the flights and that they would thus be governed only by the requirements of Part 91. Rather, we agree with the law judge that respondent had operational control, and that these flights were governed by the requirements of Part 135.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The initial decision suspending respondent's pilot certificate for 45 days is affirmed, as consistent with this opinion and order.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.